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IN THE

Supreme Court of the United States

October Term, 1970
No. 1661

BEVERAGE DISTRIBUTORS, INC., a corporation,
Petitioner,

vs.

OLYMPIA BREWING CO., a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the United States Court of Appeals, entered March 1, 1971 (App. B of Petition) is not yet reported. The Memorandum of Decision of the United States District Court for the Northern District of California, entered December 22, 1969 (App. B of Petition) is unreported. The Order of the Court of Appeals, dated April 6, 1971, denying petitioner's petition for rehearing and suggestion for rehearing in banc, is attached hereto as Appendix A.

Jurisdiction.

The jurisdictional grounds are set out in the petition.

Questions Presented.

1. Whether this Court should review judgment entered on a jury verdict, when there is substantial evidence in support thereof and no misapplication of law.

2. Whether a beer manufacturer may institute a policy of wholesale fair trade, pursuant to a valid state statute authorizing such a policy, when done independently and not in furtherance of any combination or conspiracy in restraint of trade.

3. Whether a beer manufacturer may cease doing business with a distributor with whom its relationship is order-to-order, terminable at will, when it does so independently and not in furtherance of any combination or conspiracy in restraint of trade.

Statutes Involved.

The pertinent provisions of the Sherman Act (§1, 15 U.S.C. §1), the Clayton Act (§§4 and 16, 15 U.S.C. §§13 and 26) and the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code §§24749, 24750) are set out as Appendix A of the Petition. No issue was presented to the district court or the Court of Appeals respecting Section 2 of the Sherman Act (15 U.S.C. §2) which is also appended to the Petition.

Statement of the Case.

This litigation concerns the alleged involvement of respondent Olympia Brewing Company[1] in a combination or conspiracy in violation of Section 1 of the Sherman Act. The combination or conspiracy which petitioner set out to prove, and submitted to the jury,

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[1]Consistent with the style adopted in the petition and throughout the proceedings below, this brief will refer to petitioner as "BDI" and to respondent as "Olympia".

was between Olympia and other manufacturers of beer products or their trade association, and between Olympia and wholesalers of beer in California or their trade association. Its purpose or effect was said to be: restricting the territories within which, or the customers to whom, Olympia Beer could be resold; fixing and maintaining the price of beer; preventing expansion of the central warehouse method of beer distribution; fair trading the wholesale price of Olympia Beer; and declining to fill further orders from BDI—all aimed at preventing BDI from selling Olympia Beer to any customer other than Safeway Stores, Inc.

On fifteen trial days, commencing November 3, 1969, the jury heard 23 witnesses, saw 258 exhibits, and listened to argument and instruction for three days. On December 11 the case was submitted and the same day the jury returned a verdict for Olympia.

By customary post-trial motion, BDI sought entry of a judgment notwithstanding the verdict, and entry of a permanent injunction.[2] Noting that the jury had resolved all significant issues from conflicting evidence in Olympia's favor, the district court denied BDI's motion and entered judgment for Olympia (App. B of Petition, p. 5).

BDI's appeal to the Ninth Circuit was essentially factual. The Court of Appeals observed its duty to reverse in the face of "undisputed facts" or the application of an erroneous legal standard in the court below (App. B of Petition, p. 10), found neither in the voluminous record before it, repeatedly noted the conflict in the evidence (App. B of Petition, pp. 9, 16, 20,

[2]The issues of equitable relief were reserved by the district court for decision until after the jury had reached its verdict, in conformity with a practice approved by this Court. *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).

23, 24 and 26) and the failure of BDI to object to the trial instructions (App. B of Petition, pp. 9, 20, 23, 24 and 26) and affirmed. BDI's application for rehearing in banc was likewise denied, no judge deeming the case appropriate for rehearing in banc (App. A hereto).

The salient facts established at trial are these:

The relationship between Olympia and BDI began when BDI was appointed an Olympia Beer distributor by letter of June 2, 1953 [Ex. S]. The relationship thereby created was non-contractual [R.T. 700; R.T. 2068-2069], expressly stated to be without value, order-to-order and terminable at the will of either party. Olympia also informed BDI [Exs. S and U]—and BDI acknowledged [Exs. T and V; R.T. 689-701]—that as a matter of policy the Olympia Brewing Company regarded the distributorship relationship as a matter of personal trust and confidence.

Neither the letter of appointment nor any other communication between Olympia and BDI set forth any restriction on the territory to be served or the customers to whom BDI could distribute Olympia Beer.

BDI always sold Olympia Beer in every area where it was licensed by the State of California to do so. Until August of 1967, however, BDI sold Olympia Beer only to its former parent and "principal customer" [R.T. 1300], Safeway Stores, Inc., whom it served as exclusive supplier [R.T. 286]. When BDI determined to change this historic pattern, it announced a plan of selective expansion by which it proposed to favor some, but not all, of its retail customers [Ex. 12]. Olympia unequivocally repeated to BDI its position that "every distributor has a right to sell to customers of his own selection." [Ex. 13].

Olympia entered into fair trade agreements with two of its California wholesalers, effective August 10, 1967 [Exs. 15 and 16]. To do so was consistent with the declared policy of the State of California with regard to distribution of alcoholic beverages and was pursuant to statutory authorization of the California Business & Professions Code [Calif. Bus. & Prof. Code §§24749, 24750].

BDI thereafter submitted a number of orders for the purchase of Olympia Beer. All orders which were not cancelled by BDI were filled by Olympia until August 30, when this lawsuit was filed by BDI, charging Olympia with criminal violations of the law and imputing to it hostile motives in dealing with BDI [Ex. FF, R.T. 682, 1367-1368]. Upon receiving the first set of orders from BDI after service of suit, Olympia executives concluded that it would be imprudent to entrust the marketing of a perishable product to a distributor in whom there no longer reposed mutual respect or confidence [R.T. 251, 266-269].

From the general verdict in Olympia's favor, it must be concluded the jury believed that Olympia was not a member of or party to any combination or conspiracy in restraint of trade; that Olympia acted independently for its own business reasons when it decided to institute fair trade in California at the wholesale level; that Olympia likewise acted independently when it decided, after this suit was commenced, not to accept further orders from BDI; that BDI was not restricted or limited in the conduct of its business by any act or attitude of Olympia; and that BDI suffered no injury to its business or property by reason of any act of Olympia.[3]

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[3]Inasmuch as the case went to the jury on the issue of damages as well as liability, the general verdict imports a finding in Olympia's favor on both issues. See *Bank of America v. Hayden*, 231 F. 2d 595 (9th Cir. 1956).

ARGUMENT.

This is a common or garden variety case of unproved conspiracy. Without serious effort to meet any of the standards of Rule 19, BDI's petition asks this Court to review a uniquely factual controversy, from which no rule of general application can be derived.

1. *The petition poses no conflict between the judgment of the Ninth Circuit and that of any other Court of Appeals.* It could not: the Ninth Circuit decided no question of substantive law. What the Court of Appeals decided, in the exercise of its power as an appellate court, was (i) that the jury verdict, and judgment thereon, were supported by substantial evidence; (ii) that there were no undisputed facts which justified reversal [noting *Albrecht v. The Herald Company,* 390 U.S. 145 (1968)]; and (iii) that the verdict and judgment were not premised on an erroneous legal standard [noting *United States v. Parke, Davis & Co.,* 362 U.S. 29, 44 (1960)] (App. A of Petition, p. 10).

2. *The petition poses no question of federal law, important or otherwise, which has not been settled by this Court.* It could not: BDI does not suggest that the facts of this case present for decision any substantive matter on which this Court has not spoken before. The most recent views of this Court on the issues litigated were *all* announced *before* trial, [*E.g., United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967); *Albrecht v. The Herald Company, supra*] and were considered in framing the trial instructions. [See *infra* at p. 7].

3. *The petition poses no federal question decided by the Ninth Circuit in any way in conflict with applicable decisions of this Court.* It could not: the Ninth Circuit took full account of the latest opinions of this Court on

each aspect of Section 1 put in issue by BDI. The trial court did likewise, for its instructions covered all of BDI's theories of liability, and as to each incorporated the rules of law most recently stated by this Court, *e.g.*:

combination or conspiracy: *Albrecht v. The Herald Company, supra; United States v. General Motors Corp.*, 384 U.S. 127 (1966) [Instructions, R.T. 2319-2325, 2329-2330, 2371, 2377-2379; Ninth Circuit Opinion, App. B of Petition, pp. 10, 20, 24];

territorial or customer restrictions: *United States v. Arnold, Schwinn & Co., supra* [Instructions, R.T. 2371-2372; Ninth Circuit Opinion, App. B of Petition, pp. 8, 11-21];

fair trade: *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) [Instructions, R.T. 2372-2376; Ninth Circuit Opinion, App. B of Petition, pp. 21-23];

termination: *Albrecht v. The Herald Company, supra*; *United States v. Arnold, Schwinn & Co., supra; United States v. Colgate & Co.*, 250 U.S. 300 (1919) [Instructions, R.T. 2322-2323, 2329-2330, 2371; Ninth Circuit Opinion, App. B of Petition, pp. 24-25];

unlawful purpose: *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Frankfort Distilleries, supra* [Instructions, R.T. 2330-2371, 2376; Ninth Circuit Opinion, App. B of Petition, pp. 23-24].

Fully aware of those decisions, BDI took no exception to any of the instructions given by the trial court.[4]

In short, the only justification BDI offers to induce this Court to assume the role of trier of fact is the assertion that the record below contained "undisputed and conclusive evidence overlooked or disregarded by the Courts" (Petition, p. 7)—an egregious misstatement of the record on appeal. The Ninth Circuit was at pains to catalogue the conflicting evidence on each material issue of fact; and specifically directed its attention to those items of documentary proof offered by petitioner, which BDI now adjures were "totally ignored." (Petition, p. 9).

On the issue of territorial or customer restriction, BDI invites this Court's attention to 3 of some 210 exhibits it offered at trial. Each of these three was placed before the jury in the closing argument of BDI's trial counsel. [R.T. 2424-2426, 2450-2452]. Each was examined by the Ninth Circuit.[5] Indeed, Exhibit 100[6]

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[4]BDI did object to the refusal of the trial court to give two minor, noncritical instructions, the substance of which was, as the Court of Appeals noted, adequately covered by the instructions given (App. B of Petition, p. 25).

[5]Exs. 51 and 52: App. B of Petition, pp. 12, 13, 16-21;
Ex. 100: App. B of Petition, p. 13, n. 7.

[6]Although BDI now urges the "chilling effect" of Exhibit 100 on BDI's efforts to expand sales, it offered no evidence at trial that the existence or contents of Exhibit 100 was known to any of its operating personnel. If BDI had "notice" of anything as a result of that memorandum, it was simply because BDI was party to a suit in which the memorandum was filed and a copy of it was served on its attorney of record, Willard Johnston, then a shareholder of BDI and now owner of 60% of BDI's stock [R.T. 579], who is counsel of record here. Although Mr. Johnston was present throughout the trial, BDI chose not to call him. The jury was justified in inferring that his sworn testimony would not have supported the argument made in closing argument and repeated in the petition.

was the specific basis on which petitioner sought rehearing before the Ninth Circuit.[7]

As the Court of Appeals repeatedly observed, these items of proof were controverted by extensive evidence, including: testimony of Olympia's distributors that they were free to sell wherever and to whomever they chose [R.T. 1457, 1521, 1555, 1595, 1373-1374] and did so without comment from Olympia [R.T. 1454-1455, 1426-1427, 1428-1431, 1516-1521]; testimony of Olympia's officers, district managers and sales personnel that they did not limit Olympia's distributors in their sales activities [R.T. 1150-1168, 1306, 1341, 1425], but rather encouraged them to undertake the widest possible distribution [R.T. 99, 189] and to service all possible accounts [R.T. 1150]; and proof that BDI sold Olympia Beer throughout the State of California and, presumably, to whom it wished.[8] Thus there is no analogy to this Court's action in *Albrecht*, upon which BDI curiously relies. In *Albrecht* the "undisputed facts" were just that: non-testimonial and non-controverted by the defendant. By contrast, every material element of BDI's proof in the trial court was vigorously disputed through testimony on the stand as well as documentary evidence from which the jury was free to draw contrary inferences in Olympia's favor.

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[7]Order denying rehearing, App. A hereto; BDI's Petition for Rehearing is attached hereto as Appendix B. Exhibit 100 is discussed at pp. 2, 3 and 4.

[8]As noted above, BDI sold Olympia Beer to Safeway out of historic reverence for its quondam parent and "principal customer" [R.T. 285-286, 1240-1300. Ex. FE]. Never throughout its tenure did BDI manifest to Olympia any notion of expanding its sales [R.T. 1301-1304]; in fact, it turned down opportunities to do so without telling Olympia of the opportunity or BDI's decision. [R.T. 497, 1041].

On the issue of fair trade, BDI apparently complains that the jury evaluated Olympia's "purpose" differently than petitioner would wish. Yet it concedes the Ninth Circuit adopted BDI's own version of the applicable legal standard (App. B of Petition, p. 23) in appraising the jury verdict (Petition, p. 10). We are at a loss to see what is left of a Section 1 fair trade case without a conspiracy. *Cf. First National Bank v. Cities Service Co.,* 391 U.S. 253 (1968).

The issue of termination is a non-issue at best. Olympia is perfectly free to select those with whom it will deal so long as it does so independently. [*United States v. Colgate,* 250 U.S. 300, 307 (1919); *United States v. Arnold, Schwinn & Co.,* 388 U.S. at 376]. Every court which has considered the matter agrees that a manufacturer, acting alone, may terminate a distributor or substitute one for another.[9]

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[9]*See, e.g., Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Scanlan v. Anheuser-Busch,* 388 F. 2d 918 (9th Cir.), *cert. denied,* 391 U.S. 916 (1968); *Perryton Wholesale, Inc. v. Pioneer Distributing Co.,* 353 F. 2d 618 (10th Cir. 1965), *cert. denied* 383 U.S. 945 (1966); *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F. 2d 1 (9th Cir. 1963); *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F. 2d 283 (6th Cir.), *cert. denied* 375 U.S. 922 (1963); *B&B Oil & Chemical Co. v. Franklin Oil Corp.,* 1969 Tr. Cas. ¶72,737 (E.D. Mich. 1968); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 278 F. Supp. 938 (C.D. Calif. 1967); *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F. Supp. 899 (D. Md.), aff'd, 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F. 2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

BDI's citation to *Albrecht* in this context is plainly wrong. Neither *Albrecht* nor any other case[10] holds that termination of a dealer is made *unlawful* simply because it follows commencement of litigation.[11] Such a holding would lead to the palpably ridiculous result that the first side to the clerk's office wins. As the Ninth Circuit noted (App. B to Petition, p. 24), the jury was amply instructed, without objection from BDI, in accord with *Albrecht*. The resultant verdict simply means the jury viewed Olympia's decision to decline BDI's orders as unilaterally and lawfully motivated.

Conclusion.

BDI's petition is devoid of any reason why this Court should concern itself with the issues of fact presented. No new question of law is offered for consideration; no conflict in legal standards between the Ninth Circut and other circuits is suggested; no misapplication of law is claimed; no issue of any consequence, beyond the factual dispute already thrice-resolved in Olympia's favor, is raised.

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[10]The decisions cited by BDI, *e.g., Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725 (3rd Cir. 1962); *F. K. Weingartner v. Union Oil Co.*, 1966 Tr. Cas. ¶71,757 (N.D. Calif. 1965); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867 (2d Cir. 1962), all deal with the availability of an injunction pendente lite and are inapposite on this point since they do not establish any rule applicable to liability.

[11]BDI typically mischaracterizes the records: Olympia did not terminate BDI because fair trade didn't work [*supra*, p. 5]; nor did Olympia ever urge that commencement of litigation "justified" a termination otherwise unlawful.

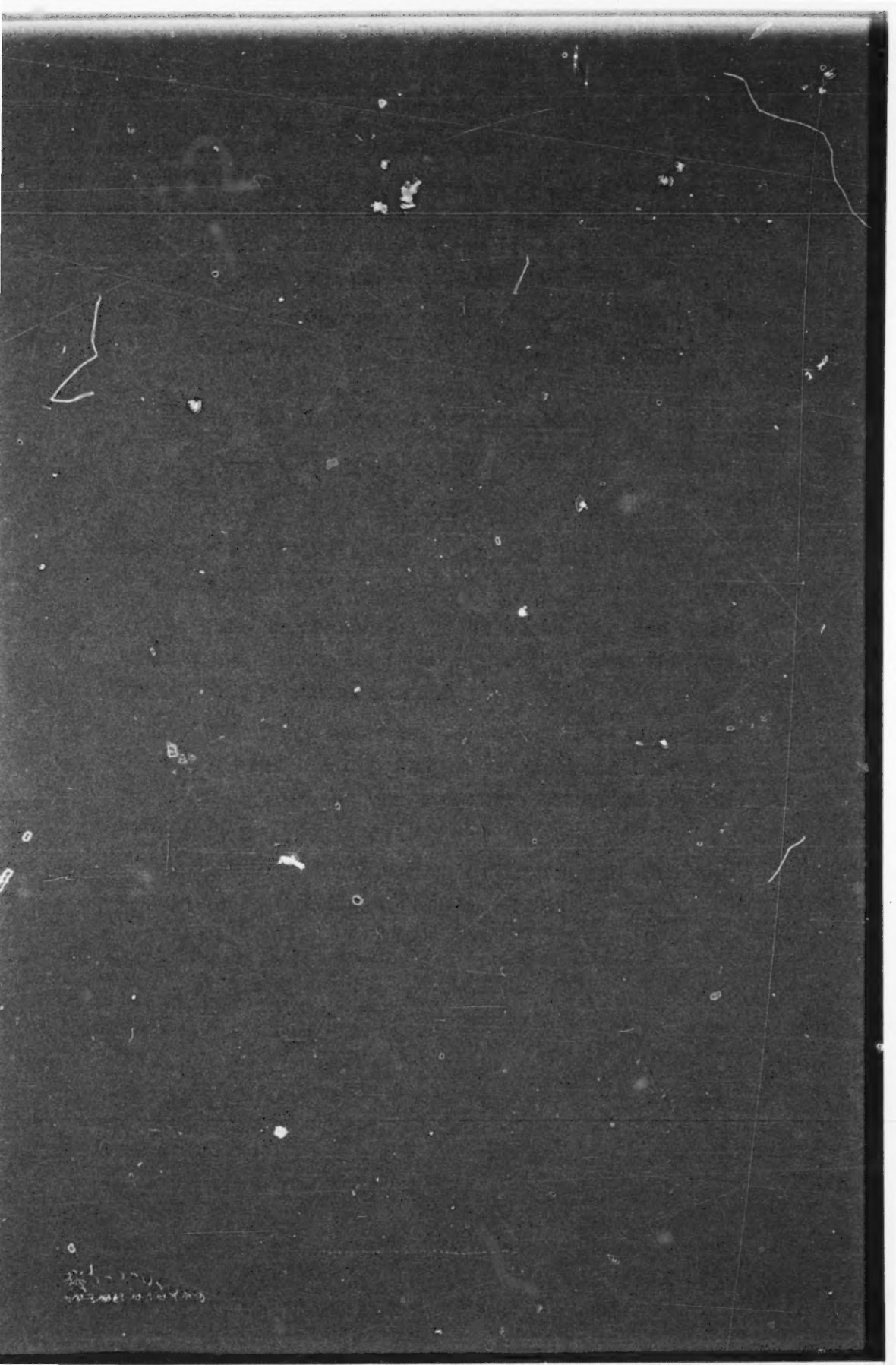
As determined by the district court and the Ninth Circuit, the evidence reasonably supports the determination of fact made by the jury and the judgment of the court thereon. [*Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944)]. It is respectfully submitted that a writ should not issue to call up and review the judgment of the Court of Appeals for the Ninth Circuit.

Dated: May 14, 1971.

DAVID BRICE TOY,
PAMELA ANN RYMER,
Counsel for Respondent.

Of Counsel:
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
611 West Sixth Street,
28th Floor,
Los Angeles, Calif. 90017.

SKEEL, MCKELVY, HENKE, EVENSON & BETTS,
HARRY HENKE, JR.
1020 Norton Building,
Seattle, Wash. 98104.



Appendix A

United States Court of Appeals,
for the Ninth Circuit

No. 25,463

BEVERAGE DISTRIBUTORS, INC., a corporation,
Plaintiff-Appellant,
vs.
OLYMPIA BREWING CO., a corporation,
Defendant-Appellee.

ORDER

Before: BROWNING, WRIGHT and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

United States Court of Appeals,
for the Ninth Circuit

No. 25,463

BEVERAGE DISTRIBUTORS, INC., a corporation,
Appellant,

vs.

OLYMPIA BREWING CO., a corporation,
Appellee.

On Appeal From the United States District Court, for the Northern District of California.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

1

A. Introduction.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Appellant Beverage Distributors, Inc. respectfully petitions for a rehearing, following this Court's decision of March 1, 1971, on the following grounds:

1. In holding that any restraint upon BDI prior to 1967 was "self imposed" (Opinion p. 14) this Court failed to discuss the effect of Exhibit 100, which is a clear and undisputed admission that Olympia has assumed an obligation to its other distributors to protect them from competition by BDI in their franchise territories.

2. This Court's opinion is in conflict with long accepted doctrine by its failure to hold that Olympia's

purpose in entering into fair trade contracts to "deter the proliferation of warehouse distribution" by BDI constitutes a violation of anti-trust law.

B. Argument.

1—In holding that any restraint upon BDI prior to 1967 was "self-imposed" (Opinion p. 14) this Court failed to discuss the effect of Exhibit 100[1] which is a clear and undisputed admission that Olympia has assumed an obligation to its other distributors to protect them from competition by BDI in their franchise territories.

We respectfully suggest that the deference due a jury verdict cannot sustain this Court's holding that there was no restraint imposed by Olympia upon BDI prior to 1967 (Opinion p. 14). The Court has relied (Opinion pp. 13-14) upon precatory words in Olympia's letter of July 11, 1958 (Ex. 52) to hold that "it would support a jury finding that it does not constitute an 'effort' to impose territorial or customer restrictions." The Court further relies upon evidence that other distributors had sold outside their areas or at prices varying from those suggested by Olympia as a justification for the jury to believe that BDI was under no greater restraint (Opinion p. 14). Yet Exhibit 100 (copy attached as appendix) constitutes an unequivocal admission that Olympia was even then imposing a restraint against BDI for the purpose of protecting "franchise territories" of Olympia's distributors from "encroachment" by BDI, which Olympia admitted would involve

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[1]While the opinion refers to Ex. 100 (Fn. 7, page 8), the text could not properly refer to Ex. 100, since that exhibit was never mentioned in any testimony or other evidence submitted by Olympia.

"undercutting Olympia's obligation to its territorial franchises" (Ex. 100, Appendix pp. 2-3). As the Court will recall, although in the hearing before this Court we challenged counsel for Olympia to explain away the significance of this admission, he chose not to mention it. Nor did counsel for Olympia ever mention this exhibit in argument at the trial. Furthermore, no Olympia witness ever testified concerning it. Exhibit 100 therefore must be accepted as undisputed. We submit that Exhibit 100 alone compels this Court to hold that there was no substantial evidence to support a jury finding of no effort by Olympia to impose territorial or customer restrictions upon BDI. Exhibit 100 must be accepted as a statement of Olympia's anticompetitive purpose prior to 1967 and that motivating the 1967 fair trade program and subsequent refusal to deal as well.

2—This Court's opinion is in conflict with long accepted doctrine by its failure to hold that Olympia's purpose in entering into fair trade contracts to "deter the proliferation of warehouse distribution" by BDI constitutes a violation of anti-trust law.

This Court's opinion recognizes that Olympia admittedly entered into fair trade contracts with two distributors in 1967 to "deter the proliferation of warehouse distribution" by BDI (Opinion p. 15).[2] The Court also notes, apparently as constituting a justification for the combination to deter warehouse distribution, Olympia's professed concern that warehouse distribution resulted in loss of quality control (*ibid.*). Yet

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[2]The opinion erroneously states that Olympia adopted and put in operation its fair trade program in September of 1967 (Opinion p. 3). The program was adopted on the day Olympia received BDI's announcement that it intended to compete for customers of other distributors (R.T. pp. 179-184).

under well accepted anti-trust doctrine, such a *per se* restriction upon competition as the action by contract between Olympia and two distributors to "deter' a method of conducting business cannot be excused as justified by sound economic or business reasons. In *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed. 2d 1246 (1967), the Court rejected Schwinn's defense that the challenged distribution system was adopted to enable it and small independent merchants to compete more effectively against Sears, Ward and other mass merchandisers (388 U.S. at 374-377; 87 S.Ct. 1863-1864). In *United States v. General Motors,* 384 U.S. 127, 142, 86 S.Ct. 1321, 1329, 16 L.Ed 2d 415 (1966) the Court rejected the excuse that a distribution program was adopted to combat discount houses. In *Fashon Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, 467, 61 S.Ct. 703, 708, 85 L.Ed. 949 (1941) a purpose to protect the manufacturer against style pirates was held no defense. We submit that Olympia's purpose to deter warehouse distribution constitutes no better justification.

C. Suggestion for hearing in banc.

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellant respectfully suggests that a rehearing in banc be ordered. We believe that the exceptional importance of this case to California's beer distribution industry—involving the very existence of central warehousing—justifies such action. (See Ex. 147, R.T. pp. 929-931; Ex. 84, 85, 86, 87, 146, and R.T. pp. 945-948 concerning the long term campaign of the California Beer Wholesalers Association to eliminate BDI.) The importance of implementing the law against customer and territorial restrictions upon dis-

tributors is emphasized by the Federal Trade Commission's current extensive efforts to eliminate such restrictions. See, *e.g., Erie Foundry Co.*, CCH Trade Reg. Reports Par. 19, 481; *Adolph Coors Co.*, CCH Trade Reg. Reports Par. 19, 454; *Crush International Ltd.*, CCH Trade Reg. Reports Par. 19, 443.

Dated: March 15, 1971.

Respectfully submitted,

Benjamin H. Parkinson
Willard S. Johnston
Ackerman, Johnston, Norberg
& Parkinson
By Benjamin H. Parkinson
Counsel for Appellant
Beverage Distributors, Inc.